Nos. 54 & 55.

Brief of Paige for Appt.

Supreme Court of the United States

Numbers 54 and 55 of October Term, 1898.
300 and 301 of October Term, 1897.

Filed Oct. 17, 1898.

T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA,
Appellant,

v.

THE NATIONAL BANK OF JACKSONVILLE.

A BRIEF FOR APPELLANT.

Supreme Court of the United States.

NUMBERS 54 AND 55 OF OCTOBER TERM, 1898.
300 AND 301 OF OCTOBER TERM, 1897.

T. B. MERRILL, as receiver of the FIRST NATIONAL BANK OF PALATKA,

Appellant,

vs.

THE NATIONAL BANK OF JACKSONVILLE.

A BRIEF FOR APPELLANT.

These are two appeals, in the same case, from two decrees of the Circuit Court of Appeals for the Fifth Circuit.

Abstract or Statement of the Case.

The National Bank of Jacksonville exhibited its bill against Merrill, receiver of the First National Bank of Palatka, to the Circuit Court for the District of Florida.

The case was heard on bill and answer. Allegations in the bill, not denied by the answer, and allegations of other matter in the answer are as follows:

From the Bill.

"That on the 17th day of July, A. D. 1891, the said "First National Bank of Palatka failed, and closed its "doors."

"That at the time of the failure of the First National "Bank of Palatka it was indebted to your orator for sun- "dry drafts of said bank to the order of your orator on "the Hanover National Bank of New York, amounting, "with fees, to $6,010.47 (six thousand and ten and 47/100 "dollars), which said indebtedness was unsecured by col- "lateral.

"And said First National Bank of Palatka was further "indebted to your orator at the time of its failure in the "sum of ten thousand dollars ($10,000.00), and interest, "for a loan made said bank by your orator on June 5th, "A. D. 1891; that at the time said loan was made the said "First National Bank of Palatka delivered to your orator "their time certificate of deposit, No. 6120, due in sixty "days from date, bearing interest at eight per cent., to "which said bank attached, as collateral security, sundry "notes belonging to said First National Bank of Palatka, "to wit:

"St. James on Gulf	$1,000 00
"R. H. Mason	250 00
"T. V. Hinks	300 00
"G. U. Beach	300 00
"G. U. Beach	2,000 00
"The Florida Commercial Co	396 90
"A. B. Mason	1,300 00
"A. L. Hart	5,350 22
Total	$10,896 22

"The total indebtedness due to your orator from the "First National Bank of Palatka on the day of its failure "was:

"For sundry drafts	$6,010.47
"For certificate of deposit, loan and "interest	10,093.34
"Total amount due	$16,103.81

" Making a total of sixteen thousand, one hundred and " three and 81/100 dollars ($16,103.81) due to your orator " from the First National Bank of Palatka on the 17th " day of July, A. D. 1891.

" That your orator proved its claim, in due form of " law, before said Receiver aforesaid, for six thousand " and ten and 47/100 dollars, being amount of drafts due " to your orator from said First National Bank of Palatka, " and upon which said amount so proven your orator has " received distributions as follows:

" December 10th, 1892.....	35%	$2,103.67.
" May 17th, 1893.....	10%	601.05
" Total..		$2,704.72

" That in addition to proving the amount of $6,010.47 " due on sundry drafts aforesaid, your orator offered to " prove up its claim for $10,000.00, being amount of cer- " tificate of deposit secured by collateral, as aforesaid, but " the said defendant Receiver would not permit your orator " to prove the total amount of $10,000.00 and interest due " thereon for said loan as aforesaid, but under the ruling " of the Comptroller of the United States of America, " your orator was not allowed to prove its claim in full " before the defendant Receiver, but was ordered to first " exhaust the collateral given to secure said loan for $10,- " 000.00, as aforesaid, and then to prove the claim for the " difference between the amount of the loan and interest, " and the amount realized from said collateral.

" Under the ruling of the Comptroller your orator col- " lected all of the notes given as collateral to secure said " loan of $10,000.00, except the note of H. L. Hart for " five thousand three hundred and fifty and 22/100 dollars, " which last mentioned note was placed in judgment, and " which judgment was non-productive, and which said

"judgment has been assigned and transferred by your "orator to the defendant herein as Receiver, as aforesaid.

"That after exhausting the collateral your orator proved "its claim for the balance due on said certificate of deposit "for $10,000.00, so secured by said collateral, as afore- "said, to wit: for the sum of four thousand four hundred "and ninety-six and 44/100 dollars, upon which said "balance of $4,496.44 your orator has received the fol- "lowing dividends from the defendant Receiver, to wit:

"December 1st, 1892.....	$1,573.75
"May 17th, 1893.....	449.64
"Total.....	$2,033.39."

(R. in 54, pp. 2–3.)

"That your orator is informed and believes, and upon "such information and belief, so charges the truth to be "that the same rule was applied as to other creditors of "the said First National Bank of Palatka."

"That your orator does not know, without a discovery, "what amount of assets the defendant, as such Receiver, "did receive, and what disposition he made of them, or "what amount your orator is justly entitled to receive "under the distribution by the Receiver herein, and that "an accounting is necessary to ascertain the same."

(R. in 54, p. 3.)

The prayer was as follows:

"That the defendant may discover the amount of assets "of said First National Bank of Palatka that came into "his hands, and account for the same, and that the de- "fendant may be decreed to pay to your orator (and to all "other creditors of said First National Bank of Palatka "in like situation, who may come in and make them- "selves parties to this suit, and contribute to the expenses

"thereof), a *pro rata* distribution upon the entire amount "of indebtedness due to your orator from the said First "National Bank of Palatka, to wit.: upon the sum of six- "teen thousand one hundred and three and 81/100 dol- "lars, together with interest thereon from the 17th "day of July, A. D. 1891, without deducting there- "from the amount realized from collateral given to secure "a portion of said amount due your orator from said bank "as aforesaid.

"That the defendant may wind up the affairs of said "bank and of his said receivership thereof, without fur- "ther delay."

(R. in 54, p. 4.)

From the Answer.

"And further answering the said bill this defendant "denies that the complainant gave due notice that it would "demand a *pro rata* dividend upon the whole amount due "to it without deducting the amount collected on collateral "security; on the contrary thereof this defendant avers "the fact to be that the complainant accepted the said "ruling of the said Comptroller without demur and "accepted from the said Comptroller, through this defend- "ant, without protesting notice of any kind, the checks "of the said Comptroller in payment of the dividends "mentioned in the bill, and that it was not until the 15th "of March, 1894, that the complainant gave notice of any "kind that it dissented from the said ruling of the Comp- "troller, and would demand payment upon a different "basis; that since December 1st, 1892, the said Comp- "troller has made disposition of the assets of the said bank "in his hands in good faith, believing that the matter of "his said ruling was at rest; so that the complainant "should now be estopped to demand an apportionment on "a different basis.

"And further answering the said bill this defendant says "that he has realized in money from the assets of the said "bank the sum of $176,317.91; that under the orders of "the said Comptroller he has disbursed the sum ot $31,- "561.33 for the expenses of his receivership, 'in which "expenses are included moneys paid on decree in litigated "case in this Court, and for loans paid, etc., amounting "to the sum of $17,653.55'; that he has transmitted to "the said Comptroller, as required by law, the sum of "$143,849.03; that there remains in the hands of this de- "fendant the sum of $907.55, which is subject exclusively "to the orders of the said Comptroller, and that the re- "maining assets of the said bank consist of sundry par- "cels of real property and some securities and choses in "action, many of which are absolutely worthless, and the "value of the rest of which cannot be estimated."

(R. in 54, pp. 9–10.)

Upon this the circuit court made a decree.—That

1. The complainant was entitled to receive dividends upon the whole face of the indebtedness due 17th July, 1891, with interest, less the dividends actually paid to it.

3. That the receiver, Merrill, declare the dividend and pay it out of any assets which were in his hands 15th March, 1894.

This suit was begun 11th September, 1894. (R. in 54, p. 5.)

3. That he file an account. (R. in 54, p. 17.)

From this decree Merrill appealed to the court of appeals.

That court made a decree reversing the decree of the circuit court, and remanding the cause to that court with directions to enter a decree that the receiver "do recog-

nize" the complainant "as a creditor" "in the said sum "of $10,093.34, as of date July 17th, 1891; and that he "do pay the same or certify the same to the Comptroller "of the Currency, to be paid in due course of administra- "tion," (R. in 54, p. 29.)

From that decree Merrill now appeals.

And this is number 300 of 1897, and 54 of 1898.

We suppose this decree to be not appealable, because it is not final.

The mandate coming down, the circuit court entered a decree in accordance with the opinion of the court of appeals.

From that decree Merrill appealed to the court of appeals.

That court dismissed his appeal, and from the decree dismissing the appeal Merrill now appeals. (R. in 55, p. 30).

This is number 55 of 1898, and 301 of 1897.

Acts of Congress supposed to bear on the question of jurisdiction.

Chapter 290, Laws 1882. 22 Stat., 163.

"CHAP. 290.—An act to enable national banking associa- "tions to extend their corporate existence, and for "other purposes."

"SEC. 4.—That any association so extending the period "of its succession shall continue to enjoy all the rights "and privileges and immunities granted and shall con- "tinue to be subject to all the duties, liabilities, and re- "strictions imposed by the Revised Statutes of the United "States and other acts having reference to national bank- "ing associations, and it shall continue to be in all re- "spects the identical association it was before the

"extension of its period of succession: *Provided, how-*
"*ever*, That the jurisdiction for suits hereafter brought
"by or against any association established under any law
"providing for national-banking associations, *except suits*
"*between them and the United States, or its officers and*
"*agents*, shall be the same as, and, not other than, the
"jurisdiction for suits by or against banks not organized
"under any law of the United States which do or might
"do banking business where such national-banking asso-
"ciations may be doing business when such suits may be
"begun: And all laws and parts of laws of the United
"States inconsistent with this proviso be, and the same
"are hereby, repealed."

Italics mine.

Chapter 866 of 1888, 25 Stat., 434.

"That the circuit courts of the United States shall have
"original cognizance, concurrent with the courts of the
"several States, of all suits of a civil nature, at common
"law or in equity, where the matter in dispute exceeds,
"exclusive of interest and costs, the sum or value of two
"thousand dollars, and arising under the Constitution or
"laws of the United States," * * *

(p. 436.)

"SEC. 4. That all national-banking associations estab-
"lished under the laws of the United States shall,
"for the purposes of all actions by or against them,
"real, personal, or mixed, and all suits in equity, be
"deemed citizens of the States in which they are respec-
"tively located; and in such cases the circuit and district
"courts shall not have jurisdiction other than such as they
"have in cases between individual citizens of the same
"State.

"*The provisions of this section shall not be held to*
"*affect the jurisdiction of the United States courts in*

" *cases commenced* by the United States or *by direction* " *of any officer* thereof, or *cases for winding up the* " *affairs of any such bank*."

Italics mine.

Chapter 517 of 1891, 26 Stat., 827:

" SEC. 5. That appeals or writs of error may be taken " from the district courts or from the existing circuit " courts direct to the Supreme Court in the following cases:

" In any case in which the jurisdiction of the court is " in issue; in such cases the question of jurisdiction alone " shall be certified to the Supreme Court from the court " below for decision.

" From the final sentences and decrees in prize causes.

" In cases of conviction of a capital or otherwise in- " famous crime.

(828.) " In any case that involves the construction or " application of the Constitution of the United States.

" In any case in which the constitutionality of any law " of the United States or the validity or construction of " any treaty made under its authority, is drawn in ques- " tion.

" In any case in which the constitution or law of a State " is claimed to be in contravention of the Constitution of " the United States.

" Nothing in this act shall affect the jurisdiction of the " Supreme Court in cases appealed from the highest court " of a State, nor the construction of the statute providing " for review of such cases."

" SEC. 6. *That the circuit court of appeals* established " by this act *shall exercise appellate jurisdiction to review* " *by appeal*, or by writ of error *final decision in* the " district court and *the existing circuit courts in all cases* " *other than those provided for in the preceding section* " *of this act*, unless otherwise provided by law, and the " judgments or decrees of the circuit courts of appeals

" shall be final in all cases in which the jurisdiction is de-
" pendent entirely upon the opposite parties to the suit
" or controversy, being aliens and citizens of the United
" States or citizens of different States; also in all cases
" arising under the patent laws, under the revenue laws,
" and under the criminal laws and in admiralty cases, ex-
" cepting that in every such subject within its appellate
" jurisdiction the circuit court of appeals at any time may
" certify to the Supreme Court of the United States any
" questions or propositions of law concerning which it
" desires the instruction of that court for its proper de-
" cision. And thereupon the Supreme Court may either give
" its instruction on the questions and propositions certi-
" fied to it, which shall be binding upon the circuit court
" of appeals in such case, or it may require that the whole
" record and cause may be sent up to it for its considera-
" tion, and thereupon shall decide the whole matter in
" controversy in the same manner as if it had been brought
" there for review by writ of error or appeal.

" And excepting also that in any such case as is herein-
" before made final in the circuit court of appeals it shall
" be competent for the Supreme Court to require, by
" certiorari or otherwise, any such case to be certified
" to the Supreme Court for its review and determination
" with the same power and authority in the case as if it
" had been carried by appeal or writ of error to the
" Supreme Court.

" *In all cases not hereinbefore, in this section, made*
" *final there shall be of right an appeal or writ of error*
" *or review of the case by the Supreme Court of the*
" *United States* where the matter in controversy shall
" exceed one thousand dollars besides costs. But no
" such appeal shall be taken or writ of error sued out
" unless within one year after the entry of the order,
" judgment, or decree sought to be reviewed."

Italics mine.

Acts of Congress supposed to affect the merits.

Revised Statutes.

"SEC. 5234. On becoming satisfied, as specified in "sections fifty-two hundred and twenty-six and fifty-two "hundred and twenty-seven, that any association has re- "fused to pay its circulating notes as therein mentioned, "and is in default, the Comptroller of Currency may "forthwith appoint a receiver, and require of him such "bond and security as he deems proper. Such receiver, "under the direction of the Comptroller, shall take pos- "session of the books, records, and assets of every descrip- "tion of such association, collect all debts, dues, and "claims belonging to it, and, upon the order of a court of "record of competent jurisdiction, may sell or compound "all bad or doubtful debts, and, on a like order, may sell "all the real and personal property of such association, "on such terms as the court shall direct; and may, if "necessary to pay the debts of such association, enforce "the individual liability of the stockholders. Such re- "ceiver shall pay over all money so made to the Treasurer "of the United States, subject to the order of the Comp- "troller, and also make report to the Comptroller of all "his acts and proceedings."

Chapter 156, Laws 1876, 19 Stat., 63.

"That whenever any national banking association shall "be dissolved, and its rights, privileges and franchises "declared forfeited, as prescribed in section fifty-two "hundred and thirty-nine of the Revised Statutes of the "United States, or whenever any creditor of any national "banking association shall have obtained a judgment "against it in any court of record, and made application, "accompanied by a certificate from the clerk of the court, "stating that such judgment has been rendered, and has

" remained unpaid for a space of thirty days, or whenever " the Comptroller shall become satisfied of the insolvency " of a national banking association, he may, after due " examination of its affairs, in either case, appoint a " receiver who shall proceed to close up such association, " and enforce the personal liability of the stockholders, as " provided in section fifty-two hundred and thirty-four of " said statutes."

Revised Statutes.

" SEC. 5236. From time to time, after full provision " has been first made for refunding to the United States " any deficiency in redeeming the notes of such associa- " tion, the Comptroller shall make a ratable dividend of " the money so paid over to him by such receiver on all " such claims as may have been proved to his satisfaction " or adjudicated in a court of competent jurisdiction, and, " as the proceeds of the assets of such association are paid " over to him, shall make further dividends on all claims " previously proved or adjudicated; and the remainder of " the proceeds, if any, shall be paid over to the share- " holders of such association, or their legal representa- " tives, in proportion to the stock by them respectively " held."

Specification of Errors.

1.—The court of appeals erred in dismissing the appeal.

2.—The court of appeals erred in holding that the complainant was entitled to dividends upon an amount equal to the whole of its original debt, although more than half of it had been paid in cash.

3.—The court of appeals erred in not holding that the complainant's laches was such as to prevent it from maintaining its bill—and that its demand was stale; and that its remedy was at law.

BRIEF OF THE ARGUMENT.

I.

The court of appeals erred in dismissing the appeal.

There is jurisdiction of the circuit court in this case because it is a suit between a national bank and an "officer" of the United States (22 stat. 163, § 4, quoted above) and probably also because it is a suit "for winding up the affairs of" the bank (25 stat. 436, § 4, quoted above) as from the prayer and frame of the bill plainly appears.

It is thus *not* one of the cases in which the decree of the court of appeals is final (26 stat. 827, § 6, quoted above).

Jurisdiction to review the decision of the court of appeals upon the merits is, therefore, not only given but is "of right" (26 stat. 827, § 6, quoted above).

Nor can the case come up in any other way than through the court of appeals.

The cases in which an appeal may be taken from a circuit court to the Court are enumerated in section 5 (26 stat. 827, above quoted). This is not one of them. And section 6 provides that the circuit courts of appeals "shall exercise appellate jurisdiction to review by appeal "or by writ of error final decision in the district court "and the existing circuit courts in ALL *cases other than* "*those provided for in the preceding section of this act*, "unless otherwise provided by law" (26 stat. 827, § 6, "above quoted), and it is *not* "otherwise provided by "law."

Assuming its first decree to be not appealable, because not final, the decree dismissing the appeal must be appealable or the jurisdiction of the Court is defeated.

The decisions of the Court upon which the court of appeals has rested its decree—namely, that a decree en-

tered upon a mandate is not appealable—have not any application. In those cases the effect of an appeal would have been simply to force a rehearing upon the Court. If the court of appeals were the court of last resort the reason would apply, but it is not.

We have an appeal to the Court as "of right." If the first decree is not appealable the second must be.

Of course it is not any matter of concern to us which is the one which is appealable. In some form and in some shape an appeal lies and therefore one of the appeals must be good.

II.

The court of appeals erred in holding that the complainant was entitled to dividends upon an amount equal to the whole of its original debt, although more than half of it had been paid in cash.

This will be argued by Mr. Oldham.

III.

The court of appeals erred in *not* holding that the complainant's laches was such as to prevent it from maintaining its bill; and that its demand was stale; and that its remedy was at law.

The bill alleges that the complainant "offered to prove "up its claim for $10,000," "but under the ruling of the "comptroller of the United States of America, your

" orator was not allowed to prove its claim in full before " the defendant receiver, but was ordered to first exhaust " the collateral given to secure said loan for $10,000.00, as " aforesaid, and then to prove the claim for the difference " between the amount of the loan and interest, and the " amount realized from said collateral.

" *Under the ruling of the comptroller your orator* " *collected,*" upon the collateral $5,003.56, and :—

" That *after exhausting the collateral your orator proved* " *its claim for the balance,*" being $4,496.44—upon which it has received $2,033.39 in two dividends paid 1 December, 1892, and 17 May, 1893.

" *That the same rule was applied as to the other cred-* " *itors of the First National Bank of Palatka.*"

(*Italics* mine. R. in 54, p. 3.)

" *That your orator gave due notice that it would de-* " *mand a* pro rata *dividend upon the whole amount due* " *your orator, without deducting the amount collected on* " *collateral security.*"

(*Italics* mine, R. in 54, p. 4.)

The answer denies the last italicised allegation and alleges that " on the contrary thereof this defendant avers " the fact to be that the complainant *accepted the said* " *ruling of the said comptroller* without demur and " *accepted from the said comptroller, through this de-* " *fendant, without protesting notice of any kind; the* " *checks of the said comptroller in payment of the divi-* " *dends* mentioned in the bill, and that *it was not until* " *the 15th of March, 1894, that the complainant gave* " *notice of any kind that it dissented from* the said ruling " of the comptroller and would demand payment upon a " different basis; that since December 1st, 1892, *the said* " *comptroller has made disposition of the assets* of the " said bank in his hands in good faith, *believing that the* " *matter of his said ruling was at rest;*"

That the defendant "has transmitted to the said comptroller, as required by law, the sum of $143,849.03; "that there remains in the hands of this defendant the "sum of $907.55, which is subject exclusively to the "orders of the said comptroller, and that the remaining "assets of the said bank consist of sundry parcels of real "property and some securities and choses in action, many "of which are absolutely worthless, and the value of the "rest of which cannot be estimated."

(R. in 54, pp. 9-10.)

It thus appears:

That the bank failed 17 July, 1891.

That the complainant offered to "prove up its claim "for $10,000."

That the comptroller ruled that it could only prove for the balance after exhausting the collateral.

That it "accepted" the ruling of the comptroller.

That it then exhausted the collateral.

As the collateral consisted entirely of paper which had been discounted by the Palatka bank, this would have been done within two months from 5 June, as that was the time of the loan (R. in 54, pp. 2-3) that is to say, by the first of September, 1891.

That it then voluntarily proved its claim "to the satisfaction of the comptroller" for the balance, and received its two dividends without any sort of dissent.

By these two dividends the comptroller distributed all the assets, "believing that the matter of his said ruling "was at rest."

That there were other creditors who had collateral as to whom the same ruling was made and the same action taken and this bill was filed as well on their behalf as on behalf of the complainant.

The date of the final distribution is fixed by the date of the last dividend. It is seventeenth of May, 1893.

That it was not until nearly a year after this—the fif-

teenth of March, 1894—that the complainant gave any indication of dissent.

And not until September that it filed its bill—a period of three years and three months.

1. *The complainant made a promise, valid because based upon a good consideration—that is to say: the distribution of the assets to the other creditors—that it would take its dividends upon the basis of the amount of its claim left after "exhausting" its collateral.*

Under the ruling of the comptroller it collected from its collateral $5,003.56, and then proved its claim to the "satisfaction" of the comptroller for the balance—$4,496.44.

This would be about the first of September, 1891.

Upon this it received two dividends—1 December, 1892 and 17 May, 1893—amounting to $2,033.39. Of course it must have known that the comptroller must have been distributing the assets at the same time to all the other creditors—since the Act of Congress is that the comptroller should make from time to time *ratable* dividends upon *all* claims which have been proved to his satisfaction or adjudicated in a court of competent jurisdiction.

And it made no indication of dissent until the fifteenth of March, 1894, the comptroller having then distributed all the assets, except the $905, and the worthless assets, by the two dividends of 1 December, 1892, and 17 May, 1893.

This distribution is a good consideration for the promise which will be implied from the complainant's

First.—"Exhausting" the collateral.

Secondly.—Proving for the balance of its claim only.

Thirdly.—Standing by and seeing without objecting, the comptroller distribute the assets, taking at the same times its own two dividends upon that basis.

2. *The complainant's remedy, if it had any, was at law, and the bill should therefore have been dismissed for want of equity.*

The bill alleges "that the same rule" (the rule that the complainant should be allowed to prove only for the balance of its claim after it had exhausted its collateral) "was applied as to other creditors of the said First "National Bank of Palatka."

R. in 54, p. 3.

And it prays that "the defendant may be decreed to "pay to your orator (*and to all other creditors of said "First National Bank of Palatka in like situation, who "may come in and make themselves parties to this suit, "and contribute to the expenses thereof*)."

R. in 54, p. 4. Italics mine.

The bill is thus filed on behalf of all the other creditors who had collateral as well as on its own behalf.

If the $905 left were sufficient to pay the complainant, which it is not, *how about the others "in like situation," who have a right to come in?*

The bill prays

First, a discovery by the receiver of the assets which came into his hands—

Secondly, that he account for everything—

Thirdly, that he pay to the complainant *and the other creditors "in like situation"* a pro rata distribution upon the face of their claims—

Fourthly, that he wind up the affairs of the bank and his receivership without delay,

R. in 54, p. 4,

and there was a decree for an account and that the defendant pay,

R. in 54, pp. 17, 18.

The act of congress provides that the defendant shall convert the assets into cash and pay the cash into the

treasury to the order of the comptroller of the currency.

That is the whole of *his* duty

R. S., Sec. 5234 (quoted above)

and that "*the Comptroller* shall make a ratable dividend "of the money so paid over to him *by such receiver* on all "such claims as may have been proved to his satisfaction "*or adjudicated in a court of competent jurisdiction*,"

R. S., Sec. 5236.

Italics mine.

It is settled that if the claimant is dissatisfied with the ruling of the comptroller he may, in a suit *against the receiver*, have his claim "adjudicated by a court of com- "petent jurisdiction" and it will then become one of the claims upon which the comptroller is to make a "rata- "ble" dividend.

Bank *v.* Case, 100 U. S., 446.

Accordingly, the court of appeals, in this case, has reversed the whole of the decree of the circuit court and directed the entry of a decree simply establishing the amount of the claim, and that the receiver "pay the same "*or* certify the same to the Comptroller of the Currency "to be paid in due course of administration,"

R. in 54, p. 29,

which is the correct way—

Bank v. *Case*, 100 U. S., 446, 447, 456.

But this remedy is at law and a simple assumpsit.

Bank v. *Case*, 100 U. S., 446, 455.

When the court of appeals reversed all the decree but this, it therefore held that there was no equity in the bill and should have dismissed it, because there was an ade- quate remedy at law.

3. *The bill should have been dismissed for the* LACHES *of the complainant.*

Assuming that a bill in equity would lie to adjudicate a claim, it is certain that a simple assumpsit at law will also lie.

Bank v. *Case*, 100 U. S., 446, 455.

In this aspect of the case the remedies are concurrent, and the question now is how soon after the claimant knows that he has not proved his claim to the "satisfac-"tion" of the comptroller, must he sue.

If the complainant had sued at law possibly the law court might have felt itself bound to act in analogy to the state statute of limitations.

But it has not sued at law. It has come into equity; and there the rule is widely different.

It has come into equity after—1, three years and three months; 2, proving its claim for the balance only; 3, standing by and, without objection, not only seeing the comptroller distribute the assets, but taking its own share, "so that the said comptroller has made disposition "of the assets of the said bank in his hands in good faith, "believing that the matter of his said ruling was at rest."

(Answer—admitted, R. in 54, p. 9.)

In *McKnight* v. *Taylor*, 1 How., 161, 168, the Court, speaking by Mr. Chief Justice Taney, said (p. 168):

"For it is not merely on the presumption of payment, "or in analogy to the statute of limitations, that a court "of chancery refuses to lend its aid to stale demands. "There must be conscience, good faith and reasonable "diligence to call into action the powers of the Court, and "where these are wanting the Court is passive and does "nothing; and, therefore, from the beginning of equity "jurisdiction there was always a limitation of suit in that "court."

In *Mackall* v. *Casilear*, 137 U. S., 556, the Court, speaking by Mr. Chief Justice Fuller, said, p. 566:

"The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. *And where the difficulty of doing entire justice by reason of* the death of the principal witness or witnesses, or from *the original transactions having become obscured by time, is attributable to* gross negligence or *deliberate delay* a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence. *Jenkins* v. *Pye*, 12 Pet. 241; *McKnight* v. *Taylor*, 1 How. 161, 168; *Godden* v. *Kimmell*, 99 U. S. 201; *Landsdale* v. *Smith*, 106 U. S. 391; *Le Gendre* v. *Byrnes*, 44 N. J. Eq. 372; *Wilkinson* v. *Sherman*, 45 N. J. Eq. 413.

"The time for this son to have attacked his father on the ground of fraud was prior to that father's death; yet no movement was made to set aside these alleged fraudulent conveyances until five years after that event transpired. The father died testate, and by his will the property in controversy, subject to the Casilear conveyances, passed to the brothers and sisters of complainant as the father's devisees, who were natural objects of the bounty of the testator, and, so far as this record shows, entitled to his consideration. *The allegations of the bill fall far short of discharging the burden, which rested on the complainant, of satisfying the court that his delay had not operated to the prejudice of these parties.*

"Without regard to the deed of February, 1880, the rule in question would forbid relief, and, so far as that deed is concerned, complainant could not elect to take under it, and then claim that delay was excused *while he experimented in trying his case by piecemeal.* Of

" course it must be admitted that an affectionate son would " feel a natural reluctance to make a charge of fraud " against his father, but where the time consumed in over- " coming this is prolonged, as in this instance, we cannot " recognize the relationship as sufficient explanation of " the laches.

" These views are applicable to the defendants Casilear. " Casilear purchased at a sale under a trust deed given to " secure a note for $3,000, in respect to which there is no " allegation that the note was not for value received. The " excuse for the delay is that complainant protested " against Casilear's claim and notified him that he would " not submit to the sale; but the mere assertion of a " claim, unaccompanied by any act to give effect to it, " cannot avail to keep alive a right which would other- " wise be precluded. It is said, however, that complain- " ant had been engaged in negotiations from time to time " with Casilear, orally and by mutual correspondence in " writing, which complainant hoped would result in a " settlement and adjustment of their differences in regard " to the property held by him; but the bill does not state " that Casilear gave any encouragement to such hopes, " or ever promised any settlement or adjustment, or ever " conceded that his purchase was in any respect doubtful, " or ever in any way recognized the claim of the com- " plainant."

Italics mine.

That it is not the time alone which is of importance is well settled.

In *Hammond* v. *Hopkins*, 143 U. S. 224, the Court, speaking by Mr. Chief Justice Fuller, said:

(p. 250). "Each case must necessarily be governed by " its own circumstances, since, though the lapse of a " few years may be sufficient to defeat the action in one

" case, a longer period may be held requisite in another, " dependent upon the situation of the parties, the ex- " tent of their knowledge or means of information, great " changes in values, the want of probable grounds for " the imputation of intentional fraud, the destruction of " specific testimony, the absence of any reasonable im- " pediment or hindrance to the assertion of the alleged " rights, and the like."

And in *Whitney* v. *Fox*, 166 U. S. 637, the Court, speaking by Mr. Justice Harlan, said:

(p. 647) "Equity will sometimes refuse relief where a " shorter time than that prescribed by the statute of " limitations has elapsed without suit. It ought always " to do so where, as in this case, the delay in the " assertion of rights is not adequately explained, and " such circumstances have intervened in the condition " of the adverse party as render it unjust to him or " to his estate that a court of equity should assist the " plaintiff. It is impossible to doubt that Whitney " knew, for many years, while Lawrence was in proper " mental condition, that the latter did not admit, but " denied, that the former had any just demand against " him. But Whitney forebore to assert the rights which " he now asserts, and although having abundant oppor- " tunity to do so, and having, if his present claims are " just, every reason for promptness and diligence, he " nevertheless slept upon his rights and made no de- " mand upon Lawrence until disease had so far deprived " the latter of his reason and faculties that he could " not sufficiently comprehend any matter of business sub- " mitted to him. Under the peculiar circumstances of " this case, the court below rightly held that the plain- " tiff's laches cut him off from any relief in equity."

In *Penn Mutual Insurance Co.* v. *Austin*, 168 U. S. 685, the Court, speaking by Mr. Justice White, said:

(p. 698). "The reason upon which the rule is based "is not alone the lapse of time during which the neglect "to enforce the right has existed, but the changes of "condition which may have arisen during the period in "which there has been neglect. In other words, where "a court of equity finds that the position of the parties "has so changed that equitable relief cannot be afforded "without doing injustice, or that the intervening rights "of third persons may be destroyed or be seriously "impaired, *it will not exert its equitable powers in "order to save one from the consequences of his own "neglect.* The adjudicated cases, as said in *Galliher v. "Cadwell, supra*, 372, 'proceed on the assumption that "the party to whom laches is imputed has knowledge "of his rights, and an ample opportunity to establish "them in the proper forum; that by reason of his delay "the adverse party has good reason to believe that the "alleged rights are worthless or have been abandoned; "and that, because of the change in condition or rela- "tions during this period of delay, it would be an injus- "tice to the latter to permit him now to assert them.'"

Italics mine.

The facts of this case fit to every part of this rule. The defendant knew its rights. It had abundant opportunity to establish them in the proper forum—the comptroller of the currency had, by the delay and acceptance of the ruling and monies, good reason to believe that they were worthless or abandoned—and because of the change in the condition or relations during this period of delay—*i. e.*, the paying out of all the money without objection, it would be injustice, not only to the comptroller of the currency, but to those to whom the money was paid and distributed, to permit the right to be now asserted.

And in *Galliher* v. *Cadwell*, 145 U. S. 368, the Court, speaking by Mr. Justice Brown, said:

(p. 373) "But it is unnecessary to multiply cases. They "all proceed upon the theory that laches is not like "limitation, a mere matter of time; but principally a

" question of the inequity of permitting the claim to be " enforced—*an inequity founded upon some change in* " *the condition or relations of the property or the* " *parties.*"

Italics mine.

The case nearest like this in facts and in lapse of time—which has been found is

(*Ferson* v. *Sanger*, Davies, 252.) In that case Judge Ware said:

(p. 264) " It is nó denial of justice to leave the party to " such remedy as the law will give. Equity therefore " says to the suitor, that while the statute bar may not " be imperative, yet that in Equity there is a presumption " independent of the statute, not fixed to any invariable " time, but depending on the nature and circumstances of " the case, which may be a bar to equitable, when it would " not be to legal, relief. In these cases of concurrent " jurisdiction, Equity will not interpose with her extraor- " dinary powers unless the matter is brought before the " Court in such time as will leave to it the power of ad- " justing all the material equities involved in the case, in " such a manner that, while justice is done to one party, " injustice will not be done to another. If this cannot be " done, and this is the consequence of the delay, Equity " will not act on the right, but leave it for the decision of " law."

In that case there was a bill to recover back monies paid for a bond for the right of preemption of certain lands upon the ground that plaintiff "was induced by the " fraudulent misrepresentations of the defendants to pay " for their right an exorbitant price." It appeared that the plaintiff had gone into possession of the land, " mort- " gaged it, and finally allowed the mortgagees to fore-

"close and extinguish his title." So that of course, he could not restore the land to the defendants.

The bill was filed within the time of the statute of limitations.

The decrees should be reversed and the bill dismissed.

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